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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-856

SENATOR BARRY GOLDWATER, ET AL., *Petitioners,*

v.

PRESIDENT JAMES EARL CARTER AND
SECRETARY OF STATE CYRUS R. VANCE, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF MYRES S. McDOUGAL AND W. MICHAEL REISMAN FOR LEAVE TO FILE BRIEF AMICI CURIAE

and

BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

MYRES S. McDOUGAL
W. MICHAEL REISMAN
127 Wall Street
New Haven, Connecticut 06520
(203) 436-8279

Amici Curiae

December 6, 1979

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1. Pursuant to Supreme Court Rule 42(3), Myres S. McDougal and W. Michael Reisman, as professors who specialize in international and constitutional law and have written and testified in the Senate on the issues raised in the instant case, and who, as citizens and lawyers, are concerned about the integrity of constitutional procedures in the conduct of foreign affairs

of the United States, move the Court for leave to file, as *amici curiae,* the attached brief in support of the petition for certiorari.

2. This case is of major interest and concern to many lawyers and citizens. If the Court of Appeals' decision is allowed to stand, it will enormously increase the power of one person to terminate international agreements to which the United States is party, all but abrogating the historic constitutional procedures by which Congress was vouchsafed a role in a key part of the treaty process and through which political power in our system has been checked and balanced. Externally, it will weaken rather than strengthen the foreign affairs power, for henceforth foreign governments will no longer be able to rely on the durability of our treaties, since they will be terminable at the will of one person.

3. Many lawyers and citizens are particularly concerned because the decision of the Court of Appeals is candidly expedient, globalizes the foreign affairs power into a single factitious entity and fails to distinguish the different sequential phases in the processes of making and terminating agreements, treats constitutional history in a somewhat cavalier fashion, and ignores the extent to which it will actually impair the Executive's future conduct of foreign affairs.

4. Petitioners have consented to the filing of a brief *amici curiae* in support of the petition for certiorari. A request for consent to file such a brief was rejected on behalf of respondents by Kenneth Geller, Esquire, of the Solicitor General's office in a telephone conversation on December 4, 1979.

5. In light of the substantial impact of the Court of Appeals' decision, if permitted to stand, on the interests and concerns of all citizens, the Court is urged to grant this motion and to grant leave to file a brief *amici curiae* in support of the petition for certiorari.

Respectfully submitted,

/s/ MYRES S. MCDOUGAL
Myres S. McDougal
W. MICHAEL REISMAN
127 Wall Street
New Haven, Connecticut 06520
(203) 436-8279

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BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICI

A description of *Amici* and their interest is set forth in the preceding Motion for Leave to File Brief *Amici Curiae* in Support of Petition for Certiorari.

REASONS FOR SUPPORT OF THE PETITION

The issue raised by the decision of the Court of Appeals, one of first impression in the history of the Republic, is of increasing importance to our political and legal system: whether the Congress is to have any constitutional role in any of the sequences of decision comprised in the process of termination of treaties.

With the growth of international interdependence and the increasingly permeable line between foreign and domestic affairs, the number and importance of international agreements in national policy making and execution is being steadily enlarged. Moreover, many agreements involve major commitments in the nation's destiny. Thus, the exclusion of the Congress from the termination of all agreements imports a radical restructuring of our constitutional system in favor of the Executive, not for peripheral and ephemeral matters, but for matters which may be of the greatest national concern. Even if such a development should be considered desirable, it should not be accomplished through a decision which is candidly expedient, which globalizes the concept of a foreign affairs power into a single factitious entity and fails to distinguish the very different sequential phases in the processes of making and terminating agreements, which treats constitutional history in a somewhat cavalier fashion and which, while accepting the detrimental domestic consequences of its decision, completely ignores the extent to which its decision will actually *impair* the Executive's future conduct of foreign affairs.

The Court of Appeals isolates the conduct of foreign affairs from domestic activities and globalizes the foreign affairs power, assigning all of it to the Executive, as the exclusive "organ," it says repeatedly, of the nation in external affairs. That is a dangerously misleading metaphor. Foreign affairs is a bundle of competences, many of which are shared or divided sequentially as a way of checking and balancing power in our system. The enumerated powers of the Congress have been regarded from the beginning of our history as including the competence to authorize and approve

international agreements and would indeed be relatively meaningless in the absence of such competence. The President does not, for example, "make" agreements; Congress is assigned key and indispensable roles in a number of the sequences of agreement making. While the President is indeed the exclusive actor in certain communications abroad such as negotiation and ratification, he is only the organ. He alone is not the organ grinder.

Globalization obscures the sequences involved in the making and termination of agreements. The shaping of policies by agreement involves three broad functions, each of which reflects a different internal allocation of competence. The first is the making of agreements, for which there is both constitutional text and abundant practice indicating an intricate distribution of competence between the President and the Congress, with flexibility for context, level of crisis and so on. The second function is the performance and enforcement of agreements, also a matter of shared competence. The third function is that of terminating agreements once they have served their purpose.

Much of the confusion surrounding the discussion of this third function may be traced to the failure to analyze sequentially what is involved in the termination of an agreement. It is not a single act, over which the Constitution gives one or another branch full competence. It is a complex sequence of acts, for each of which the Constitution and constitutional practice have established and maintained different configurations of competence. It includes:

1) the formulation of the policies whether an agreement should be terminated (modified or suspended) and the authorizing of such termination;

2) the conduct of negotiations to effect termination;

3) the repeal of the law of the land established by an agreement; and

4) the giving of formal notice to the other party of the termination of the agreement.

It is apparent that the Court of Appeals, like many commentators, has confused the treaty termination issue by referring simultaneously and indiscriminately to many of these sequences.

Nor is the Court of Appeals' review of constitutional history satisfactory. The constitutive document of 1789 does not deal explicitly with a termination competence. Some scholars and high officials have responded to this silence in astonishing ways. A number have argued that, in the absence of a provision withholding power, it is to be assumed that the Constitution gives all power to the President in this important matter. This is a dangerous notion which if taken seriously could undo our historic constitutional arrangements. Where there is an apparent gap in the basic constitutive document, the appropriate juridical task is to refer to the fundamental purposes of the entire constitutive enterprise, to see how those purposes can best be served in the gap area in ways consistent with freedom, security, efficiency and all other policies.

In our system of a complex allocation of competences and historic checks and balances, designed after several millennia of experience to preserve freedom, it is simply preposterous to conclude in the absence of express provision that a comprehensive, exclusive power goes to the President. Where we deal with international

agreements which are the law of the land, including many for whose prescription and termination the whole Congress is assigned a major constitutional role, the assumption that the termination of that law is solely an executive function is, to say the least, far from self-evident. Where we deal, as in defense treaties, with matters involving the preparation for and contingent declarations of war—a manifestly congressional competence under the Constitution—the assumption of a shared competence is even stronger.

Not surprisingly, termination practice during the past 200 years has transpired in extraordinarily varied political circumstances and has been equally and appropriately varied. But, contrary to the President's position, there is no clear past precedent to support an unauthorized executive termination against the wishes of Congress. The expectations created by past practice are entirely opposite.

Internationally, the decision of the Court of Appeals, rather than strengthening the foreign affairs power in respect to treaties, actually weakens it. Prior to the decision below, treaty partners could assume that, if the United States chose the modality of the treaty for an international agreement as against two other more informal modalities, then it was intentionally making an agreement that was insulated, through constitutionally mandated procedures, from capricious terminations or from unilateral termination as a result of threats from a third party. If the decision below is permitted to stand, then, at the very best, prospective treaty partners will not be able to gauge how much to rely on a treaty; at the very worst, they will conclude that the United States can no longer make durable agreements.

In our opinion, the better constitutional view, confirmed by a careful examination of past instances of termination, is that in the absence of material breach or *rebus sic stantibus* and, arguably, in the absence of an overwhelming external crisis to the body politic, the presumption must be that the President requires congressional authorization to terminate any agreement other than a presidential agreement. Where the agreement falls squarely in an area of competence which the Constitution gives to Congress, such as war and defense, and where the modality of agreement chosen is a treaty or congressional-executive agreement, the presumption requiring congressional authorization for termination becomes virtually absolute.

One of the most destructive aspects of the Court of Appeals' decision is that it creates expectations about future constitutional competence while claiming that it is not deciding the larger issue. The Executive emerges from the Court of Appeals believing that its claim of exclusive constitutional competence has been vindicated, while a number of congressmen aver that they will henceforth insert reservations in treaties as to termination procedure. But, if the issue of general competence has in fact been decided, such reservations will not avail. The prospect is one of more internal conflict, a development the Court of Appeals seems to accept by its bland *renvoi* of the matter to "political" arrangements. In this respect, the court below has failed to discharge its mandate in a constitutional case, which is to decide in ways that clarify competences for future decision.

The question in this case is not the political one of whether the treaty with Taiwan should be terminated, but the legal one of by what constitutional procedures

our country should make such a choice. In our view, this case urgently requires review by the highest tribunal, lest serious errors of law and a decision patently based on considerations of expediency rather than of constitutional law stand and distort our historic constitutional framework. The costly-bought sharing and balancing of power in our constitutional process, which has so long served our freedoms so well, should not lightly be abandoned.

Respectfully submitted,

Myres S. McDougal
W. Michael Reisman
127 Wall Street
New Haven, Connecticut 06520
(203) 436-8279

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